No. 11794

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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JOSHUA HENDY CORPORATION, a corporation,

*Appellant.*

*vs.*

LOUISE E. MILLS, Administratrix of the Estate of Thomas C. Mills, Deceased,

*Appellee.*

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## BRIEF OF APPELLEE AND CROSS-APPELLANT.

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## BRIEF OF APPELLEE AND CROSS-APPELLANT.

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### I.

### Statement of Basis of Original and Appellate Jurisdiction.[1]

This action was filed pursuant to the provisions of Section 16(b) of the Fair Labor Standards Act of 1938, hereinafter sometimes referred to as the Act.[2] Jurisdiction vested in the District Court by that section and by Section 24(8) of the Judicial Code (28 U. S. C., Sec. 41(8)).

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[1]Applicable to both Appeal and Cross-Appeal.

[2]Public No. 718, 75th Cong., Chap. 676, 52 Stat. 1060-1069 (1938), 29 U. S. C., Secs. 201-219.

Subsequent to the trial of the action and before decision, the Portal-to-Portal Act of 1947[3] became law. Section 2 of the Portal Act, as it will sometimes herein be referred to, withdraws jurisdiction of certain overtime wage claims previously enforceable under the Fair Labor Standards Act. Whether or not the District Court had jurisdiction of this claim depends upon whether the "activities" for which compensation was awarded were "compensable" within the meaning of the Portal Act, as the trial Court found.

This Court had jurisdiction of the appeal and cross-appeal under the provision of Section 128 of the Judicial Code (28 U. S. C., Sec. 225).

## II.

## Statement of the Case.[4]

### A. Questions Involved on the Appeal, and Manner in Which Raised.

1. Was the construction of cargo vessels by the appellant for the United States Maritime Commission "production of goods for commerce" within the meaning of the Fair Labor Standards Act?

This issue is raised by the pleadings, the statement of issues [R. 7], and the findings of fact and conclusions of law.

2. Is there any evidence to support the Court's judgment that the activities for which compensation was awarded, were "compensable activities?"

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[3]Pub. Law 49, 80th Cong., Chap. 52.

[4]Applicable to both Appeal and Cross-Appeal.

This issue is raised by the record, the findings of fact and the conclusions of law.

3. If it were to be construed to deprive Mr. Mills of his compensation under the facts of this case, is Section 2 of the Portal Act constitutional?

B. Questions Involved on the Cross-Appeal and Manner in Which Raised.

1. Did the Court err in permitting appellant to amend its answer after the trial by setting up the defense of "good faith" where there was no evidence to support such defense?

This issue is raised by the motion to amend, by the amended answer and by Cross-Appellant's Statement of Points on Appeal.

2. Is there any evidence to support the Court's finding that defendant's failure to compensate plaintiff's decedent was "in good faith"?

This issue is raised by the findings of fact and conclusions of law, and by Cross-Appellant's Statement of Points on Appeal.

3. Is cross-appellant entitled to liquidated damages in addition to the unpaid compensation?

This issue is raised by the pleadings, the findings of fact and conclusions of law, and by Cross-Appellant's Statement of Points on Appeal.

4. Should the trial Court have awarded an attorney's fee larger than $75.00 for the services of appellee's counsel in the Court below?

This issue is raised by the judgment and by Cross-Appellant's Statement of Points on Appeal.

## C. Statement of Facts.

Appellee does not propose to re-state the facts, some of which are recited in Appellant's Brief in a light favorable to appellant's position [R. 3-4]—but will simply confine herself to certain corrections and additions deemed material.

Appellant's statement that the cargo vessels and troop transports were built as weapons of war is not complete. They were built for carrying on the commerce of the United States as well, as the contract between the Maritime Commission and appellant explicitly stated. [Deft. Ex. A, pars. 1 and 2 of the Recitals, R. 135.]

The Commission could not hire or fire employees [Deft. Ex. A], and if any employees actually were discharged at the request of the Commission [R. 100], it was simply in fulfillment of the appellant's obligation to the Commission to use precaution for security purposes. [Deft. Ex. A, Art. 2(e), R. 138; *Ibid.,* Art. 18(a)(b), R. 165-6.] Similarly, the Commission had no power to establish rates, but simply required plaintiff not to pay more than certain approved rates [Deft. Ex. A, Art. 5, R. 146] nor other than certain rates established by law. [Deft. Ex. A, Art. 19(d), R. 167.]

The only purposes for which the Commission had its representatives in appellant's shipyard were to protect its costs on the "cost plus" contracts and for "security": "After all," Appellant's Industrial Relations Officer testified, "we were supposed to be running the yard." [R. 100.]

It is apparent that Mr. Mills may have eaten his lunch at odd moments during his shift. However, it is clear and uncontradicted that he was not relieved of his duties at all and never had more than five or ten minutes uninterrupted at any one time.

## III.
## The Appeal.

### A. Summary of Argument.

Thomas C. Mills was employed by the appellant in the production of goods for interstate commerce. Ships are goods as defined by the Fair Labor Standards Act. These goods produced by appellant were transported out of the State. Further, the ships were built to and do carry on the commerce of the United States.

The duties which kept Mr. Mills from having a lunch period were compensable activities. Mr. Mills was engaged at an hourly rate, and appellant expressly agreed to pay him that rate for each hour he worked. It did not pay him for the lunch period in which it required him to work, in violation of its agreement with him.

If Section 2 of the Portal Act were to be so construed as to require other and further agreements beyond the appellant's agreement to pay Mr. Mills so much per hour and to pay him time and one-half for work beyond his basic "workday," coupled with the orders and requirement that he perform his regular duties during his lunch period, that section would be in violation of the Fifth Amendment to the Constitution.

## B. Argument.

### 1. *Appellant's Production of Ships Was the Production of Goods for Interstate Commerce.*

Section 3(i) of the Fair Labor Standards Act defines "goods" to include ships; Section 3(b) defines "commerce" to include "transportation [or] transmission . . . among the several States or from any State to any place outside thereof."

So it has been held that the construction of cargo vessels and troop transports for the Maritime Commission under contracts substantially the same as Defendant's Exhibit A, constitutes the production of goods for interstate commerce.

> *St. Johns River Shipbuilding Co. v. Adams* (C. C. A. 5, 1947), 164 F. (2d) 1012.

It is immaterial that title to the goods produced was in the United States government.

> *Divins v. Hazeltine Electronics Corp.* (C. C. A. 2, 1947), 163 F. (2d) 100.

Even apart from the fact that these ships were produced not only to aid in carrying on the war, but also specifically "to carry on the commerce of the United States," this production was for commerce because the ships were transported out of the State.

> *Bailey v. Porter* (N. D. Ill., 1947), 13 Labor Cases, paragraph 63,874;[5]
>
> *Timberlake v. Day & Zimmerman* (D. C. Ia., 1943), 49 F. Supp. 28;
>
> *Lasater v. Hercules Powder Co.* (E. D. Tenn., 1947), 13 Labor Cases, paragraph 63,946.[5]

[5]Official Reporter Citation not available.

Moreover, even had the defendant been engaged in producing combat vessels rather than vessels suitable for carrying on the commerce of the United States, and even if the definitions of the Act confined "commerce" to business or commercial transactions, the activities of Mr. Mills would have been within the coverage of the Act. This Court in *Ritch v. Puget Sound Bridge & Dredging Co., Inc.* (C. C. A. 9, 1946), 156 F. (2d) 334, pointed out numerous ways in which the Navy as such was engaged in "commerce" in that restricted sense.

On April 14, 1948, Judge Leon R. Yankwich, in *J. H. Devine v. Joshua Hendy Corp.* (S. D. Cal., Civ. No. 6176-Y), held in an oral opinion (judgment not yet signed at the date of printing of this brief) that the appellant here, which is the defendant in that case, was engaged in producing goods for commerce.

Appellant places its reliance on *Northern Pacific Railway Co. v. U. S.* (1947), 330 U. S. 248. In this case the Court had to determine whether or not the Government was entitled to reduced freight rates under the Transportation Act of 1940 on the theory that the materials were "military or Naval property" "moved for military or Naval use."

One need seek no further than the opinion in that case for the complete answer to appellant's argument.[6] The

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[6]Appellant's basic premise that "commerce" as used in the Act is applicable only to commercial or business transactions and not to production for war, is in itself erroneous. The Act is applicable to commerce in its full constitutional sense and in that sense "it is immaterial whether or not the transportation is commercial in character." *Walling v. Haile Gold Mines* (C. C. A. 4), 136 F. (2d) 102. Thus, the power of Congress under the Commerce clause extends to the transportation across State lines of one's own personal goods, *U. S. v. Hill,* 248 U. S. 420; of people, *Ed-*

Supreme Court there rejected the petitioner's interpretation of the statutory definition based upon "other Congressional enactments under which such materials were excluded because not mentioned, or were included by specific reference." It referred to "the different wording of those Acts and the different ends they served," as well as to the principle that acts dealing with public grants must be construed strictly against the grantee and in favor of the Government.

Similarly, in *U. S. v. Powell* (1947), 330 U. S. 238, the Court dealing with the same problem this time rejected the Government's position, stating that the definitions in the Lend-Lease Act could not aid in interpreting the different definition in the Transportation Act.

So, here, the definitions of "goods," "commerce" and "production for commerce" contained in the Fair Labor Standards Act are completely different from the definition of "military or naval property" in the Transportation Act; the two statutes serve different purposes; the Fair Labor Standards Act being remedial is to be broadly construed to extend its benefits, while the Transportation Act is to be strictly construed against the carrier.

The logical result of appellant's argument would require a holding that the Fair Labor Standards Act becomes inapplicable in time of war because under modern conditions virtually all production is directed toward the prosecution of the war. As the Court, in the *Northern*

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*wards v. California,* 314 U. S. 160; of a woman for immoral purpose but not commercialized vice, *Caminetti v. U. S.,* 242 U. S. 470; of a stolen automobile, *Brooks v. U. S.,* 267 U. S. 432; of a kidnapped person, *Gouch v. U. S.,* 297 U. S. 124; and of information, *International Textbook Co. v. Pigg,* 217 U. S. 91.

*Pacific R. R. Co.* case said, "Pencils as well as rifles may be military property."

Not only does the *Northern Pacific R. R. Co.* case fail to support appellant's contention, but the evidence is overwhelming that Congress intended the Act to apply to the production of armaments and other vital war materials delivered to the United States. During the war, some eighteen bills were introduced in Congress for the purpose of suspending or restricting the overtime provisions of the Act.[7] Such amendments would have been unnecessary had the existing Act not applied to workers producing war goods for the Government. Furthermore, the enactment of the Portal Act itself demonstrates that Congress did not question the applicability of the Act to employees of cost-plus-a-fixed-fee contractors with the Government. Sec. 1(a)(9) of the Portal Act contains a finding by Congress with reference to "the cost to the government of goods and services heretofore and hereafter purchased by its various departments and agencies" and concludes that "the public treasury would be seriously affected by consequent *increased cost of war contracts.*" (Emphasis added.)

Thus, it is obvious that Congress, both during and after the war, never doubted that the Act covers employees of cost-plus contractors with the Government who were engaged in the production of goods used in the prosecution of the war.

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[7]Senate Bills Nos. 2232, 2373, and 2884, and House Resolution Nos. 6617, 6689, 6790, 6792, 6795, 6796, 6814, 6823, 6826, 6835, 7054, and 7731 of the 77th Congress, 2d Session; Senate Bills 190 and 237, and House Resolutions 992 of the 78th Congress, 1st Session.

2. *Thomas C. Mills Was Employed in Activities During His Lunch Periods Which Were Compensable Under the Portal-to-Portal Act.*

The evidence establishes without contradiction that Thomas C. Mills had no lunch periods; that he was not relieved of his duties for any portion of his workday; that he performed the duties for which he was hired and which were required by the appellant throughout his workday, including the half-hour lunch periods which were allowed other employees at appellant's shipyard; and that he was paid for one-half hour less than the number of hours which he worked each day.

The trial Court found these to be the facts, and, in accordance with the parties' stipulation, that Mr. Mills was employed at certain hourly rates.

On this evidence and these findings it concluded that the activity for which Mr. Mills was not compensated was a compensable activity within the meaning of the Fair Labor Standards Act, as amended by the Portal-to-Portal Act. [R. 23.]

Appellant claims that Section 2 of the Portal-to-Portal Act bars appellee's claim.

An analysis of that section demonstrates that the Court's Conclusions and Judgment are correct and follow necessarily from the evidence.

Section 2(a) of the Portal Act relieves employers of liability to compensate for activities of an employee engaged in prior to May 14, 1947, "except an activity which was compensable by either (1) an express provision of a written or non-written contract . . .; or (2) a custom or practice . . ." The question under this subsection is simply whether or not the employee's claim is

for activities *of the type* for which appellant agreed to pay him.

In the face of the record, appellant cannot seriously contend that the activities for which compensation was awarded were not the type for which appellant agreed to pay. All four witnesses (Alcott, Anderson, Gilham and Hill) who testified as to Mr. Mills' activities, stated unequivocally that throughout the shift, including the lunch period, Mr. Mills performed the duties for which he was hired and which he was directed to perform. These were the duties for which appellant agreed to and did pay him. No other conclusion could be drawn from the evidence but that the activities in question were compensable by the express provisions of his contract, whether written or not,[8] or by the custom or practice in the establishment.

Section 2(a) being satisfied, the question under Section 2(b) is, was the activity compensable during the lunch period?

First, appellant must agree that the Portal Act does not eliminate *all* claims under the Fair Labor Standards Act for activities performed prior to May 14, 1947. Section 2 plainly states it does not. Congress contemplated that employment agreements, written or oral, or custom or practice, *then and previously in effect,* did provide for compensation, and therefore, for liability under the Act as amended by the Portal Act.

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[8]There was a written collective bargaining agreement covering Mr. Mills' employment. [R. 98, 115, 117, and see Appendix to this Brief.] It did not describe what activities each class of employees was paid for, and this phase of the employment relationship was covered by the day-by-day oral instructions given them by their foremen and superintendents.

What type of agreement or custom or practice, then and previously in effect, satisfies Section 2(b)?

Mr. Mills was employed at an hourly rate. This, in itself, is an agreement to pay so much for each hour or part of an hour spent by the employee in the duties for which he was engaged. This agreement, coupled with the express instructions and orders by the defendant to perform those duties during his lunch period, is the express agreement contemplated by Section 2(b).

What appellant is asking the Court to hold is that each time an employer wanted his employee to work overtime he must have repeated to him that he would pay for the work, in order that the time be counted as hours worked. Bearing in mind that Section 2 deals with past transactions, appellant, appellee, and the Court, being realistic, all know that such a rule would mean that Congress had, in spite of the language of Section 2 of the Portal Act, eliminated *all* claims.

The fact is that the employer and employee both understand that the original hiring agreement expressly obligates the employer to pay the hourly rate for every hour he orders his employee to work, and that is precisely the situation here. As Mr. Gilham testified about the lunch period, "That is the half hour that we was supposed to be paid for that we never got. Some of them did and part of them didn't . . ." [R. 56.]

In *Conwell v. Central Missouri Telephone Co.* (W. D. Mo., Mar. 10, 1948), 14 Labor Cases, Paragraph 64,399,[9] the plaintiffs were two night telephone operators working on eleven-hour night shifts, receiving pay for eight hours

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[9]Official Reporter Citation not available.

(later nine and nine and one-half), the balance being designated as sleeping time. The switchboards were busiest in the first half of the shift, tapering off toward morning. Sometimes the plaintiffs had two or three hours without interruption during which they slept. Other times they were disturbed too frequently to sleep. They could not leave their posts and had to attend to whatever calls came in. The practice of not paying for the three hours designated as sleeping time had continued for about twenty years. The Court gave judgment for all of the unpaid "sleeping time" on the basis of principles stated when it had previously denied defendant's motion to dismiss, 74 F. Supp. 542. The Court's opinion concerning the application of the Portal Act to the telephone operators is particularly pertinent here:

> "It is difficult to conclude that the Congress of the United States intended to deny jurisdiction of the Court over legitimate claims of employees who had actually worked many hours in excess of forty hours permitted by the Fair Labor Standards Act. Nowhere was it insisted during the consideration of the [Portal] Act that such claims were unfair or unjust or outside the scope of the Fair Labor Standards Act, nor were there any expressions indicating a desire to destroy any such claims, or the jurisdiction of the Court with respect thereto except in so far as it was necessary to deny jurisdiction with respect to the Portal-to-Portal pay cases which were not seeking compensation for actual services rendered for productive labor, but for travelling and waiting time and for other activities outside actual productive activities."

It is also interesting to note, both with respect to what has been said concerning the informal agreements covering Mr. Mills' employment, and with respect to the collective bargaining agreement hereafter to be discussed, what Judge Duncan in the *Central Missouri Telephone* case said concerning the identical argument here made by appellant:

> "If defendant is correct as to the legislative intent, then no person other than the organized groups whose compensation and working hours and conditions are fixed by working agreements would be able to enforce his right to overtime pay for time actually and legitimately earned under the Fair Labor Standards Act prior to the passage of the Portal-to-Portal Act." ( 74 F. Supp. 542 at 544.)

Moreover, the written collective bargaining agreement covering Mr. Mills' employment expressly provided for compensation for time worked in excess of his regular shift.[10]

In the case of *Frank v. Wilson & Co., Inc.,* decided in the Northern District of Illinois in 1948,[11] Judge Igoe had before him claims governed by a contract containing

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[10]Because the trial was had before the Portal Act became law, and its provisions were not, of course, known to counsel, it was not deemed necessary to delay proceedings for the purpose of obtaining and offering in evidence a copy of said agreement. Counsel for both parties to this action have stipulated in other litigation involving identical and similar claims against this defendant that the collective bargaining agreement, pertinent portions of which appear in the Appendix, covered the employment of all defendant's hourly-rate employees. *Felix A. Tully, et al. v. Joshua Hendy Corp.*, S. D. Cal., Civ. No. 5931-O'C; *J. H. Devine, et al. v. Joshua Hendy Corp.*, S. D. Cal., Civ. No. 6176-Y.

[11]14 Labor Cases, Paragraph 64,296; Official Reporter Citation not available.

substantially the same provisions as Paragraph "4" of this contract. In that case the employees were employed in the defendant's mechanical division with scheduled working hours of 8 A. M. to 12 Noon, and from 12:30 P. M. to 4:30 P. M. The defendant required all employees to be dressed in working clothes prior to punching the time clock, and to punch the clock before commencing work. A rule of the defendant required the employees to be dressed and ready to go to work at 7:55 A. M., five minutes before the start of the shift. They were paid only for the time following 8 A. M. The employment contract provided, as did the one here, for a basic workday of eight hours, and a basic workweek of forty hours, and that all time worked in excess of those hours would be paid for at the rate of time and one-half. The Court held that the five minutes during which the employees were required to be at their place of employment before their shift started were compensable within the meaning of the Portal Act by the terms of the written contract between the parties, and also by virtue of custom and practice, although the employees had never been paid for that time.

In *Devine v. Joshua Hendy Corp.* (S. D. Cal., No. 6176-Y, Apr. 14, 1948), Judge Leon R. Yankwich announced his decision (findings and judgment not yet signed) that the provisions of Sections 4 and 5 of the collective bargaining agreement between the defendant, which is the appellant here, and its employees [see Appendix] was the agreement contemplated by Sec. 2 and that employees who worked over and beyond the shift hours for which defendant paid were entitled to overtime compensation for that excess work.

The interpretation of the Portal Act by Judge Igoe in the Northern District of Illinois, by Judge Duncan in the Western District of Missouri, by Judge Yankwich in the Southern District of California, and by Judge McCormick in this case, is sound in principle because it recognizes the fact that Congress did provide that certain claims remained enforceable and that contracts such as those before two of the Courts were virtually the only types of contracts making provision for overtime compensation. Any contrary rule would, it is believed, prevent any employee from recovering overtime compensation for activities performed prior to May 14, 1947, and should therefore be rejected.

3. *The Right of Mr. Mills to Receive Overtime Compensation for the Work Which He Performed for Appellant Was a Vested Property Right. If the Portal Act Were to Be Construed to Bar His Recovery Herein It Would Be in Violation of the Fifth Amendment to the Constitution.*

Since antiquity, there has been an aversion in jurisprudence to laws operating retroactively.[12] Guided by this feeling the Greeks held invalid legislation subsequently enacted to relieve the Athenian Ambassadors of a penalty prescribed by law in effect at the time the acts were committed. Roman law included the same principle illustrated by several prohibitions laid down by the Corpus Juris Civilis.

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[12]What follows concerning the development of this abhorrence toward retrospective legislation is digested from a critical historical analysis by Dr. Elmer E. Smead, Instructor in Political Science, Dartmouth College, appearing in 20 Minn. L. Rev. 775. Authority for the statements here made are there fully annotated.

Bracton in his *De Legibus* served to carry the doctrine into the English common law. It was given wide acceptance through Coke who announced it as a legal maxim, which seemed to him to be so obviously just as to be beyond criticism. Blackstone stated it as a principle of justice which was irrefutable. The English courts, however, employed the doctrine as a rule of construction, and not as a limitation on the *power* of Parliament.

It remained for the American courts, unhampered by any rule of legislative sovereignty and having available the institution of judicial review, to employ the principle in the defense of vested rights by incorporating into it a system of limitations on legislative action. (Interestingly enough this expanded doctrine found its way back to, and was adopted by, the English courts.)

In the development in the common law of this antipathy to retroactive operation of laws, the doctrine came to be identified with "natural law," and thus given a transcendental nature as described by Chancellor Kent in *Dash v. Van Kleeck* (1811), 7 Johns (N. Y.) 477. While in relatively few cases did the Supreme Court invalidate legislation as being contrary to "natural law," statutes violating this principle were held to be contrary to the *ex post facto,* the contract, or the due process clauses of the United States Constitution.

There can be no doubt that Section 2 of the Portal Act, if applied in the manner suggested by appellant, is "retrospective" legislation in the classic Storian definition: "Upon principle, every statute, which takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new

disability in respect to transactions or considerations already past must be deemed retrospective.[13]

Appellee fully recognizes that many decisions, including decisions of the Supreme Court, have upheld legislation which at first blush appeared to violate this cardinal principle.[14] Further, at first blush, many of such decisions appear to be indistinguishable in principle from the many contrary decisions which did invalidate statutes on the ground that they work a deprivation of property without due process of law because they are retrospective in operation.

The discussion of the problem at issue here will be predicated on these premises:

The "due process" clauses of the Fifth and of the Fourteenth Amendments have the same meaning. Precedents under one are equally controlling as precedents under the other.

> *Curry v. McCanless* (1939), 307 U. S. 357, 369-370;
>
> *Bowles v. Willingham* (1944), 321 U. S. 503, 518.

The right to compensation as provided by the Fair Labor Standards Act in effect at the time the work is performed is a vested property right, and causes of action

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[13]*Society for the Propagation of the Gospel in Foreign Parts v. Wheeler* (1814), 2 Gall. C. C. 105, 139.

[14]While several district courts have held Section 2 unconstitutional, the large majority have upheld its validity. These cases are not here cited or discussed because for the most part the decisions were made on pleading questions—motions to dismiss or for summary judgment. The basic principles which govern the problem are not established by those decisions, but by the authorities discussed in the text.

accruing thereunder are property of which an employee cannot be deprived without due process of law.[15]

*Brooklyn Savings Bank v. O'Neil* (1944), 324 U. S. 697;

*Reid v. Solar Corp.* (N. D., Iowa, 1946), 69 F. Supp. 626, 637.

It will be claimed that Mr. Mills' right to be paid at the rate of time and one-half for his work in excess of forty hours in a week was a "statutory" right and not a vested property right, and as such could be withdrawn by Congress at any time before it ripened into judgment.[16]

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[15]That causes of action in general are property which cannot be divested without due process of law see:

*Pritchard v. Norton* (1882), 106 U. S. 124;

*Anderson v. Ott* (1932), 127 Cal. App. 122, 15 P. (2d) 526, 528;

*Scammon v. Commercial Union Assurance Co.* (1880), 6 Ill. App. 551;

*Devlin v. Morse* (1931), 254 Mich. 113, 235 N. W. 812, 813;

*Seaman v. Clarke* (1901), 60 App. Div. 416, 69 N. Y. S. 1002, 1004;

*Town of Walton v. Adair* (1904), 96 App. Div. 75, 89 N. Y. S. 230.

[16]In support of its claimed power to divest employees of their previously accrued right to compensation under the Fair Labor Standards Act, in the manner provided by Section 2 of the Portal Act, Congress was referred by Senate Report No. 37 to:

*Norris v. Crocker* (1851), 13 How. 429;

*U. S. ex rel. Rodriguez v. Weekly Publications, Inc.* (C. C. A. 2, 1944), 144 F. (2d) 186;

*National Carloading Co. v. Phoenix-El Paso Express* (1943), 142 Tex. 141, 176 S. W. (2d) 564, cert. den. 322 U. S. 747;

*In re Joseph T. Hall* (1896), 167 U. S. 38;

*Western Union Tel. Co. v. L. & N. R. R. Co.* (1922), 258 U. S. 13;

*Maryland v. B. & O. R. R. Co.* (1845), 3 How. 534.

The leading cases which have been cited as authority for the sweeping generalization that rights created by statute may be withdrawn (see note 16) do not support the application of that rule to the claim of Mr. Mills. In those cases the courts held it within the constitutional power of Congress or the state to terminate the right because the right existed in favor of the state and could be waived and released by the state (*Maryland v. B. & O. R. R. Co.*, 3 How. 534); because the right existed against the sovereign and the sovereign could withdraw its consent to be sued (*In re Hall*, 167 U. S. 38); because the statutory right of condemnation conferred upon a public utility by its nature became complete only upon final judgment (*Western Union Telephone Co. v. L. & N. R. R. Co.*, 258 U. S. 13); or because the right was to recover a penalty created by statute (*Norris v. Crocker*, 13 How. 429; *United States ex rel. Rodriguez v. Weekly Publications, Inc.*, 144 F. (2d) 186; *National Carloading Co. v. Phoenix-El Paso Express*, 142 Tex. 141).

The only cases of possible pertinency would be those dealing with penalties and it has uniformly been held that neither the overtime compensation nor the liquidated damages required by the Act are "penalties" created by statute.

*Overnight Transportation Co. v. Missel* (1942), 324 U. S. 572;

*Brooklyn Savings Bank v. O'Neil* (1945), 324 U. S. 697;

*Culver v. Bell & Loffland, Inc.* (C. C. A. 9, 1944), 146 F. (2d) 29.

The statutory rights which might thus be terminated are rights having an infirmity inherent in their nature and totally apart from the fact that they were created by stat-

ute. Numerous rights created by and existing solely by virtue of a statute are not so affected. As to them a deprivation without due process violates either the Fifth or the Fourteenth Amendments as the case may be.

In *Fletcher v. Peck* (1810), 6 Cranch 87, the State of Georgia had by authority of a statute conveyed land to James Gunn and others. Thereafter the statute was repealed and annulled and the conveyance declared void. A new act conveyed title to Peck who deeded to Fletcher. The Court held Peck liable on his covenants of title because the original title created by the first statute could not be divested by subsequent legislation.

*Lynch v. United States* (1933), 292 U. S. 571, was an action by beneficiaries of yearly renewable term insurance policies issued during World War I under the War Risk Insurance Act of 1917. Prior to the commencement of these suits, Congress enacted the Economy Act of 1933, providing in part that "all laws granting or pertaining to yearly renewable term insurance are hereby repealed." The courts below dismissed the actions for lack of jurisdiction. The Supreme Court reversed, holding that the war risk policies were property, created vested rights and could not be taken without just compensation.

In *Ettor v. Tacoma* (1912), 228 U. S. 148, the plaintiff had sued for damages to his property caused by original street grading. At the time the grading was done a Washington statute required cities to pay for such damage. Pending the litigation, and apparently during the trial, the statute was amended to provide that it would not apply to original grading. The Court said:

> "The necessary effect of the repealing act as construed and applied by the Court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This

> was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiff's right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation." (Citing cases, p. 156.)

In *Coombes v. Getz* (1932), 285 U. S. 434, it was held that the repeal of certain provisions in the California Constitution fixing shareholders' liability for officers' defalcations could not affect the rights of creditors arising prior to the repeal. This would be a denial of due process as well as an impairment of the obligations of contract.

In *Ginsberg v. Lindel* (C. C. A. 8, 1939), 107 F. (2d) 721, a petition in bankruptcy had been filed two months after the passage of the Chandler Act, one provision of which restricted a landlord's priority for rent to rent accrued within three months of the petition. Before the passage of that act the landlord's priority was governed by state law allowing twelve months. It was held that the lessor's statutory lien for twelve months accrued rent was a vested property right which could not be taken by Congress without violating the Fifth Amendment. The Court said, "The further contention that a right created by statute may be annulled by statute is equally erroneous in so far as the argument implies that vested property rights may be destroyed. . . . Congress in the exercise of the bankruptcy power is bound by this principle [of due process] and may not take a property right from one creditor and transfer it without compensation to another without violating the Fifth Amendment."

*Cox v. American Dredging Co.* (1910), 80 N. J. L. 645, 77 Atl. 1025, involved rights created by an act of 1788 which gave owners of meadows already banked in the right to maintain the banks at the expense of all owners. An act passed in 1904 amended the original statute by providing that landowners might be relieved of liability upon application. This was held to be an unconstitutional deprivation of property without due process.

It is obvious, therefore, that "statutory" rights and "vested property" rights are not mutually exclusive concepts. To support the constitutionality of retrospective legislation it is not sufficient to cite authorities in which the rights permitted to be withdrawn were tagged as "statutory." However the right arose, whether by statute, by contract, by tort or in some other manner is immaterial; those seeking to uphold the validity of retroactive laws abolishing rights must demonstrate that those rights are not "property" in the constitutional sense. We believe that the authorities here cited clearly establish that Mr. Mills' right to compensation in the manner required by the law in effect when his services were rendered is property in the full constitutional sense.[17]

What then of Section 2(d)? Is the Court helpless because Congress "may give, withhold or restrict jurisdiction at its discretion," and because such "jurisdiction, hav-

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[17]One need not determine whether or not the right to compensation for "portal" activities, as that term came to be popularly understood following the "portal" decisions culminating in the *Mt. Clemens Pottery* case (1946), 326 U. S. 680, is "property" in this sense and thus beyond the power of Congress to invade. The time for which the Court found Mr. Mills entitled to be paid was spent by him in actual work and service for the employer within the traditional common law concept. Mr. Mills' claim, therefore, was not based upon any new theory or application of the law, and was not what Congress thought of as "windfall."

ing been conferred, may, at the will of Congress, be taken away in whole or in part . . .”? *Kline v. Burke Construction Co.* (1922), 260 U. S. 226.

The question answers itself. The power of Congress to “ordain and establish” inferior courts, conferred by Article III, Section 1, can no more be exercised in violation of the Fifth Amendment than can the other congressional powers.[18] An effective remedy to enforce a right is as much guaranteed by the “due process” clause as the right itself.

In *Gibbes v. Zimmerman* (1933), 290 U. S. 326, a South Carolina statute had provided for certain procedure whereby the state receiver might take over banks and enforce shareholders’ liability to depositors. Following the bank holiday proclaimed by the President, a statute was passed establishing a different procedure involving considerably longer time in which the depositors might obtain redress. This was held not to be a violation of due process, the Court saying, “The appellant has no property in the constitutional sense in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of the substantial right to redress by some effective procedure.” (Citing cases, p. 332.)

In our district, Judge Leon R. Yankwich has put it this way, “. . . a vested cause of action is property and is protected from arbitrary interference . . . [a claimant] is guaranteed by the Fourteenth Amendment

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[18]Each grant of power in the Constitution may be exercised only within the limits of the other Constitutional provisions. *Lindner v. United States* (1925), 268 U. S. 5, 17; *McCulloch v. Maryland* (1819), 17 U. S. 317, 423. This limitation has been applied, among others, to the power to tax, *Child Labor Tax Cases* (1922), 259 U. S. 20, and to the power to spend, *Butler v. United States* (1936), 297 U. S. 1.

the preservation of his substantial right to redress by some effective procedure."

> *United States v. Standard Oil of California* (1937), 21 F. Supp. 645, aff'd 107 F. (2d) 402, cert. den. 60 S. Ct. 715.

An analysis of the cases upholding the withdrawal of jurisdiction reveals that invariably some effective remedy was left. *Kline v. Burke Construction Co.* (1922), 260 U. S. 226, is most often cited in support of the complete power of Congress to withdraw jurisdiction from the federal courts. There, however, an action was also pending in the state court over the same subject matter. The claim was that the refusal, pursuant to statute, of the District Court to enjoin the state action might take away the right of a decision in federal court between citizens of different states, since the state action might be decided first and a plea of *res judicata* raised. The Court held that there was no constitutional right to a judgment in federal court—but note that the remedy in either court remained available.

In *Lockerty v. Phillips* (1942), 319 U. S. 182, the Court upheld the provision of the Emergency Price Control Act which conferred exclusive jurisdiction in the Emergency Court of Appeals. Since a forum was provided, it was not necessary that the forum be the district courts.

The principle applicable here is well expressed in *Bowles v. Miller* (C. C. A. 10, 1945), 151 F. (2d) 992,

> "The remedy provided in one act of Congress for the enforcement of a right may be changed or modified, *provided a substantial remedy is left.* There is no inhibition against an act of Congress operating retroactively in making reasonable changes in the

remedy for the enforcement of a right *provided a reasonable remedy is made available.*" (p. 993. Emphasis added.)

Consider, too, the cases holding invalid legislation changing statutes of limitation to the extent that the period has run prior to the enactment. Such statutes must either begin to run on actions on or after the date of enactment or must leave a reasonable time after enactment for the filing of actions previously accrued. Otherwise, by destroying the remedy they destroy the rights back of the remedy.

*Sohn v. Waterson* (1873), 17 Wall. 596;
*Terry v. Anderson* (1877), 95 U. S. 628;
*Mitchell v. Clark* (1884), 110 U. S. 633;
*McGahey v. Virginia* (1890), 135 U. S. 662;
*Ochoa v. Hernandez y Morales* (1913), 230 U. S. 139;
*United States v. St. Louis, S. F. & T. Ry. Co.* (1926), 270 U. S. 1.

If the destruction of the remedy resulting from a shortening of the period of limitations is a denial of due process, likewise is the destruction of the remedy resulting from the withdrawal of jurisdiction.

In Section 2(d), Congress has left no remedy and has thus destroyed the right: "No court of the United States, of any State, Territory or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action . . . to enforce liability . . . on account of the failure of an employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938 . . ." This provision, therefore, likewise violates the Fifth Amendment and is not a valid exercise of Congressional control over the jurisdiction of the federal courts.

Accordingly, if, as appellant contends, the language of Section 2 cannot be construed to embrace Mr. Mills' work as "compensable activities," in so limiting the concept of compensable activities with respect to past transactions and in destroying all remedy with respect thereto, this portion of the Portal Act is an unconstitutional deprivation of Mr. Mills' property without due process of law.

## IV.

## The Cross-Appeal.

1. The Cross-Appellant Is Entitled as a Matter of Right to Liquidated Damages Because There Is No Evidence to Warrant an Inference That the Failure to Pay the Wages When Due Was in Good Faith and With Reason to Believe That It Was Not in Violation of the Law.

Section 11 of the Portal Act provides:

> "In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16(b) of such Act."

The Portal Act contains no definition of "good faith" and it is doubtful whether judicial definitions under different statutes, ranging from "absence of fraud" to a re-

quirement of positive action[19] would be helpful. At all events, there is no evidence in the record from which an inference of good faith under whatever definition is adopted may be drawn.

Further, cross-appellee failed to show any grounds, least of all reasonable grounds, for believing its failure to pay Mr. Mills was not a violation of the Act. Indeed, it did not attempt to show that it had such belief.

In Interpretative Bulletin No. 13, first issued May 3, 1939, revised October, 1939, October, 1940, and November, 1940,[20] the Administrator of the Wage-Hour Division stated:

> "As a general rule, hours worked will include (1) all time during which an employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace, and (2) all time during which an employee is suffered or permitted to work whether or not he is required to do so. In the large majority of cases, the determination of an employee's working hours will be easily calculable under this formula and will include in the ordinary case, all hours from the beginning of the workday to the end with the exception of periods when the employee is relieved of all duties for the purpose of eating meals."

The Court decisions have been uniform in holding that all time spent in "productive" activity must be counted in determining the amount of overtime payable.[21]

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[19]See 18 *Words and Phrases* 475-498.

[20]Revoked 1947 since the passage of the Portal Act.

[21]Indeed, the rule is so obviously not open to dispute that few courts have been called upon to decide it. Whether any courts will feel that the Portal Act requires a different holding in some cases remains to be seen.

See, for example:

*Fleming v. Rex Oil and Gas Co.* (D. C. Mich., 1941), 43 F. Supp. 950;

*Sunshine Mining Co. v. Carver* (D. C., Ida., 1941), 41 F. Supp. 60;

*Walling v. Blue Mountain Logging Co.* (D. C., Wash., 1942), 6 Labor Cases, Par. 61,466.

All courts which have passed upon the point have held or expressed the opinion that lunch periods must be counted as time worked unless the employee is relieved of all duties for a sufficient length of time to devote uninterruptedly to his own purposes.

*Lofton v. Seneca Coal and Coke Co.* (N. D. Okla., 1942), 6 Labor Cases, par. 61,271, aff'd (C. C. A. 10, 1943), 136 F. (2d) 359;

*Walling v. Dunbar Transfer & Storage, Inc.* (D. C. Tenn., 1943), 7 Labor Cases, par. 61,565;

*Sunshine Mining Co. v. Carver* (D. C. Ida., 1941), 41 F. Supp. 60;

*Tenn. C. I & R. Co. v. Muscoda Local No. 1123* (D. C. Ala., 1941), 40 F. Supp. 4, 10; modified on other grounds, 321 U. S. 590;

*Armour & Co. v. Wantock* (1944), 323 U. S. 126;

*Skidmore v. Swift & Co.* (1944), 323 U. S. 134;

*Fox v. Summit King Mines* (C. C. A. 9, 1944), 143 F. (2d) 926.

In this state of the law, without a single voice to the contrary, it would have been difficult to accept from cross-appellee, had it been tendered, a profession of "good faith" or an expression that it had reason to believe it was not violating the law when it failed to pay Mr. Mills for his work during his lunch periods.

2. In View of the Legal Issues Involved and the Results Accomplished the Award of $75.00 for Attorney's Fees Was Insufficient.

The recovery of judgment herein involved the proof of the claim by witnesses other than the employee because of his demise, the preparation of a Pre-trial Stipulation of Facts, of a Pre-trial Memorandum of Law, and a trial of one day. Thereafter, the Portal Act was passed and briefs were prepared covering not only the basic right to compensation but the effect of the new act on that right. Arguments were had on cross-appellee's motion to amend its answer after the trial and later upon the points raised in the trial briefs. As a result of these proceedings, judgment was awarded the plaintiff.

It is respectfully submitted that in the sound discretion of the trial court a substantially larger fee should have been awarded.

## IV.

## Appellee's Counsel Are Entitled to Further Attorney's Fees on Appeal.

It is the function of this court to fix a reasonable sum as the value of the legal services rendered to the appellee by her counsel upon this appeal.

*E. H. Clarke Lumber Co. v. Kurth* (C. C. A. 9, 1945), 152 F. (2d) 941;

*Republic Pictures Corp. v. Kappler* (C. C. A. 8, 1945), 151 F. (2d) 543;

*Stanger v. Vocafilm Corp.* (C. C. A. 2, 1945), 151 F. (2d) 894.

Counsel for appellee respectfully request that an order be made that appellant be required to pay an additional sum in an amount to be determined by the Court for the services of appellee's attorneys on this appeal.

## V.

## Conclusion.

This claim is not for activities of the "portal" type: it does not involve walking time, travel time, clothes changing time, clock punching time, "make-ready" time or any such preliminary activity. The claim is for the work which Mr. Mills was hired and directed to do. It therefore meets the test of Section 2(a) of the Portal Act as being of the type and nature which was expressly made compensable by the express provisions of the employment contract and by the custom and practice in the plant.

The employer had agreed to pay Mr. Mills his hourly rate for each hour that it required him to work. Moreover, the collective bargaining contract called for overtime payment for work in excess of the basic shift and the work shift was defined to exclude the lunch period. Thus when the employer required and directed Mr. Mills to work during his lunch period the agreement made the work compensable for that time. This met the test of Section 2(b).

Mr. Mills' right to recover the wages and liquidated damages due him for the services which he rendered to his employer at the latter's insistence was property in the constitutional sense. If it were possible to sustain appellant's contention that this right is destroyed by the Portal Act, to that extent appellee is deprived of her property without due process of law in violation of the Fifth Amendment. Just as that right cannot be destroyed so also the attempt to destroy the remedy is not a valid exercise by Congress of its control over the jurisdiction of the courts.

The record contains no evidence to justify an inference that the employer acted in good faith or had reason to be-

lieve that its failure to pay Mr. Mills was not a violation of the law. It was mandatory therefore to award liquidated damages.

In the exercise of its sound discretion, the Court below should have awarded a substantially greater attorneys' fee for the services rendered in the trial. It is the function of this Court to fix a further fee for the services of appellee's counsel rendered upon the appeal.

Wherefore, it is respectfully submitted that the judgment should be affirmed with respect to the award of unpaid overtime compensation, that it should be reversed with respect to the denial of liquidated damages with instructions to award such damages, and that attorneys' fees commensurate with the services in the Court below and on this appeal be determined.

Respectfully submitted,

MOHR & BORSTEIN, and
PERRY BERTRAM,
By PERRY BERTRAM,
*Attorneys for Appellee and Cross-Appellant.*

## APPENDIX.

### Paragraphs 4 and 5 of Union Agreement.

Between California Shipbuilding Corporation, appellant herein, as employer, and the Metal Trades Department of the American Federation of Labor, representing its employees.

4. Hours of Employment and Overtime

Forty (40) hours shall constitute a work week, eight (8) hours per day, five (5) days per week, Monday to Friday, inclusive, between the hours of 8 A. M. and 5 P. M., except that where, as to any locality or as to any plant of any Employer, existing traffic conditions render it desirable to start the day shift at an earlier hour, such starting time may, with agreement of the Employer affected and the local Metal Trades Council, be made earlier, but in no event earlier than seven (7) A. M. Overtime at the rate of one and one-half times the established hourly rate shall be paid for all work performed in excess of eight (8) hours per day and forty (40) hours per week. Since this agreement is based on the intent of six-day-per-week operation, all work performed on Saturdays shall be paid for at one and one-half times the established hourly rate. Overtime at double the established rate shall be paid for all work performed on Sundays and holidays. These provisions relative to overtime payment and for Saturday work shall be effective only during the period of the National Emergency; provided, however, that this establishment of this emergency rate shall not be used as a subterfuge to defeat the double-time provisions for Saturday work which would be in effect were it not for the National Emergency.

The provision for time and one-half for overtime and on Saturdays established for the duration of the National Emergency shall automatically terminate whenever the President of the United States shall proclaim that such National Emergency no longer exists; thereafter, all overtime shall be computed on a double-time basis.

Holidays shall be as recognized by local Metal Trades Councils. When a recognized holiday falls on Sunday, the day observed by the Council shall be considered as a holiday and paid for as such.

5. Shift Work

Shift work will be permitted in all classifications without restriction on the following basis:

(a) The regular starting time of the day shift shall be eight (8) A. M., except that where, as to any locality or as to any plant of any Employer, existing traffic conditions render it desirable to start the day shift at an earlier hour, such starting time may, with the agreement of the Employer affected and the local Metal Trades Council, be made earlier, but in no event earlier than seven (7) A. M.

(b) The regularly established starting time of the day shift shall be recognized as the beginning of the twenty-four (24) hour work day period. When irregular or broken shifts are worked, overtime rates shall apply before the regular starting time and after the regular quitting time of the shift on which the Employee is regularly employed.

(c) First or regular daylight shift: An eight and a half (8½) hour period less thirty minutes for meals on the employee's time. Pay for a full shift shall be a sum equivalent to eight (8) times the regular hourly rate with no premium.

Second shift: An eight (8) hour period less thirty minutes for meals on employee's time. Pay for a full second shift period shall be a sum equivalent to eight (8) times the regular hourly rate plus ten per cent (10%).

Third shift: A seven and one-half (7½) hour period less thirty minutes for meals on employee's time. Pay for a full third shift period shall be a sum eequivalent to eight (8) times the regular hourly rate plus fifteen per cent (15%).

(d) For work on any shift less than the full shift period, pay shall be the corresponding proportionate part of the pay for the full shift period, provided such amount be not less than the minimum pay prescribed in Paragraph 10 hereof.